State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0733

Affirmed
No Disqualification

PROCEDURAL HISTORY: On May 12, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 115143). Claimant filed a timely request for hearing. On June 6, 2016, ALJ McGorrin conducted a hearing at which the employer did not appear and issued Hearing Decision 16-UI-61129, reversing the Department's decision. On June 17, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument in which it requested the reopening of the hearing since it did not appear to present evidence on its own behalf. EAB construes the employer's request as one to allow it to offer evidence under OAR 471-041-0090 (October 29, 2006), which allows EAB to consider new information not offered during the hearing if the party seeking to introduce that information shows that factors or circumstances beyond its reasonable control prevented it from doing so. Here, the employer stated it did not appear at the hearing and therefore was unable to present evidence because the employer's service manager was out of the office on vacation the week before the hearing and, on the date of the hearing, which was the date that manager returned from vacation, the notice of hearing forwarded to him by the employer's "corporate office" was "in an unopened interoffice mail envelope on my desk." Despite this explanation, the employer did not show that it was reasonable for the office manager not to have arranged for someone to review the interoffice mail directed to his attention for time sensitive correspondence that required action while he was away or immediately after returned from vacation, and did not show that it was reasonable for the employer not to have arranged for another representative to have appeared on its behalf if the service manager was not available or not to have requested a continuance of the hearing until the service manager was available. For these reasons, under OAR 471-041-0090, EAB denies the employer's request to reopen the hearing. Accordingly, EAB considered only information received into evidence during the hearing when reaching this decision.

FINDINGS OF FACT: (1) North West Handling Systems, Inc. employed claimant from August 7, 2014 until April 13, 2016, last as a repair technician for forklifts and a paint booth operator.

(2) The employer expected claimant to meet the speed quotas it assigned for his work painting forklifts. The employer also expected claimant to perform his work repairing forklifts in a good and adequate manner. Claimant understood the employer's expectations as a matter of common sense.

(3) In approximately mid-March 2016, the foreman who supervised claimant mentioned to him that the pace at which he performed the work of painting forklifts had slowed down since he was hired and no longer was meeting the employer's speed quotas. The foreman also told claimant that his work area was too cluttered and not well organized. Claimant was aware that the pace at which he worked had slowed over time and attributed the slow-down to aging and the cumulative effects of damage to his knees and joints. After the foreman spoke to claimant, he improved the pace at which he performed his painting work, met all of the employer's speed quotas and cleaned up his work area. Claimant did not fail to meet the employer's speed quotas between mid-March 2016 and April 13, 2016. Audio at ~ 6:45.

(4) Sometime on or shortly before April 13, 2016, the employer assigned the task of repairing the radiator in a forklift to claimant. As part of this repair, claimant needed to screw an aluminum fitting into the radiator. Claimant mistakenly screwed the fitting in too tight and "popped" its threads. Audio at ~9:33. Claimant tried to re-thread the fitting to repair the damage but was unable to do so. As a consequence, the damaged fitting could not be removed from the radiator and, since the fitting no longer fit in the radiator, the radiator would leak if it was not replaced with another radiator.

(5) On April 13, 2016, the employer discharged claimant. When he was discharged, the employer told claimant that his production in painting forklifts was too slow. Audio at ~4:16. Claimant thought the employer might also have discharged him because of the radiator he damaged when he stripped the threads from the fitting.

CONCLUSIONS AND REASONS: The employer discharged claimant but not for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct. OAR 471-030-0038(3)(a) (August 3, 2011) defines misconduct, in relevant part, as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest. OAR 471-030-0038(1)(c) defines wanton negligence, in relevant part, as indifference to the consequences of an act or series of actions, or a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee. The employer carries the burden to show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Since the employer did not appear at the hearing and offered no evidence on the reasons that it discharged claimant, the only reasons available are what claimant thought. To the extent the employer discharged claimant for his supposed slowness in meeting speed quotas and his messy work area, claimant credibly testified that between mid-March 2016, when the employer notified claimant of its objections to these aspects of his performance, and the April 13, 2016 date when the employer discharged claimant, claimant rectified these alleged deficiencies and never again violated the employer's speed or work area organizational standards. Audio at ~6:17, ~7:16. Since there was no

evidence in the record to rebut claimant's testimony, the proximate cause of claimant's discharge could not have been the aspects of his performance about which he was warned in mid-March 2016 because they had ceased to exist at approximately a month before his discharge. There was insufficient evidence to establish that the employer discharged claimant for those reasons.

To the extent the employer discharged claimant because he damaged the forklift's radiator beyond repair, there was also insufficient evidence in the record to show that the damage was the result of claimant's willful or wantonly negligent behavior. Claimant credibly testified that he did not intend to damage the radiator, and he mistakenly stripped the threads on the fitting when he tightened it too tightly, and could not remove and repair the compromised fitting although he tried to do so. As claimant explained it, such mistakes did "do [sometimes] happen." Audio at ~10:22, ~10:32. By definition, a mistake is generally the result of a claimant's inadvertent behavior, of which he is not consciously aware at the time he is making the mistake. Absent evidence that claimant was aware he was tightening the fitting too tight when he screwed it in, there is insufficient evidence in the record to show claimant had the mental state when he made this mistake for it to constitute the willful or wantonly negligent behavior needed to establish disqualifying misconduct. *See* OAR 471-030-0038(1)(c). Accordingly, there is insufficient evidence in this record to establish that claimant's error in securing the fitting too tightly and necessitating the replacement of the radiator was likely the result of misconduct.

While the employer discharged claimant, the record does not show that the employer likely discharged claimant for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 16-UI-61129 is affirmed.

J. S. Cromwell and D. P. Hettle;
Susan Rossiter, not participating.

DATE of Service: <u>August 2, 2016</u>

NOTE: You may appeal this decision by filing a Petition for Judicial Review with the Oregon Court of Appeals within 30 days of the date of service listed above. *See* ORS 657.282. For forms and information, you may write to the Oregon Court of Appeals, Records Section, 1163 State Street, Salem, Oregon 97310 or visit the Court of Appeals website at courts.oregon.gov. Once on the website, use the 'search' function to search for 'petition for judicial review employment appeals board'. A link to the forms and information will be among the search results.

<u>Please help us improve our service by completing an online customer service survey</u>. To complete the survey, please go to https://www.surveymonkey.com/s/5WQXNJH. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.